IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 14-0015

GREGORY A. CHRISTIAN; MICHELLE D. CHRISTIAN; ROSEMARY CHOQUETTE; DUANE N. COLWELL; SHIRLEY A. COLWELL; FRANKLIN J. COONEY; VICKI COONEY; GEORGE COWARD; SHIRLEY COWARD; JACK E. DATRES; SHEILA DORSCHER; VIOLA DUFFY; BRUCE DUXBURY; JOYCE DUXBURY; BILL FIELD; CHRIS FIELD; ANDREW GRESS AND FRANK GRESS AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES GRESS; CHARLES GUSTAFSON; MICHAEL HENDRICKSON; PATRICE HOOLAHAN; SHAUN HOOLAHAN; ED JONES; RUTH JONES; BARBARA KELSEY; MYRTLE KOEPPLIN; BRENDA KRATTIGER; DOUG KRATTIGER; JULIE LATRAY; LEONARD MANN; VALERIE MANN; KRISTY MCKAY; RUSS MCKAY; BRYCE MEYER; MILDRED MEYER; JUDY MINNEHAN; TED MINNEHAN; DIANE MORSE; RICHARD MORSE; KAREN MULCAHY; PATRICK MULCAHY; NANCY MYERS; SERGE MYERS; LESLIE NELSON; RON NELSON; JANE NEWELL; JOHN NEWELL; GEORGE NILAND; LAURIE NILAND; DAVID OSTROM; ROSE ANN OSTROM; JUDY PETERS; TAMMY PETERS; ROBERT PHILLIPS; TONY PHILLIPS; CAROL POWERS; WILLIAM D. POWERS; GARY RAASAKKA; MALISSA RAASAKKA; ALEX REID; KENT REISENAUER; PETE REISENAUER; SUE REISENAUER; LARRY RUPP; JOHN A. RUSINSKI; KATHRYN RUSINSKI; EMILY RUSS; SCOTT RUSS; CARL RYAN; PENNY RYAN; RICH SALLE; DIANE SALLE; DALE SCHAFER; DAVID D. SCHLOSSER; ILONA M. SCHLOSSER; MICHAEL SEVALSTAD; JIM SHAFFORD; ROSEMARY SILZLY; ANTHONY SOLAN; KEVIN SORUM; DON SPARKS; VICKIE SPEHAR; ZANE SPEHAR; CARA SVENDSEN; CARON SVENDSEN; JAMES H. SVENDSEN, SR.; JAMES SVENDSEN, JR.; DOUG VIOLETTE; ESTER VIOLETTE; CAROL WALROD; CHARLES WALROD; DARLENE WILLEY; KEN YATES; SHARON YATES; LINDA EGGEN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM YELSA AND AS GUARDIAN OF MAURINE YELSA; DAVID ZIMMER; AND TONI ZIMMER,

Plaintiffs/Appellants,

vs.

ATLANTIC RICHFIELD COMPANY,

Defendant/Appellee.

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, Cause No. DV-08-173BN
Honorable Bradley G. Newman, District Court Judge

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STATEMENT OF THE ISSUES

Did the District Court correctly conclude that Plaintiffs' property damage claims were barred by the statute of limitations where: (1) the claims were based on industrial activity that occurred between 1884 and 1980; (2) the properties were in a Superfund site that has been actively remediated since 1983; (3) the environmental condition of the properties was well-known; and (4) the condition of the properties had not changed in decades?

STATEMENT OF THE CASE

Plaintiffs reside in the Deer Lodge Valley, primarily the towns of Opportunity and Crackerville, outside of Anaconda. Plaintiffs live a few miles from the former Anaconda Smelter, and their properties are within the Anaconda Smelter Superfund Site. Plaintiffs allege that their properties were damaged by milling and smelting operations that occurred "from 1884 to 1980."

There was an overwhelming record of undisputed evidence before the District Court that Plaintiffs had actual and constructive knowledge of their claims many years before they filed this lawsuit in 2008. It also was undisputed that the condition of Plaintiffs' properties had not changed since shortly after the Smelter closed in 1980. Based on a voluminous record of these and other facts—all undisputed by Plaintiffs—the District Court determined that Plaintiffs' claims were barred by the statute of limitations and granted summary judgment.

In this appeal, Plaintiffs do not focus on the critical facts underlying the District Court's decision. Instead, they focus on convincing the Court that some injustice was done in this case. Many of Plaintiffs' assertions mischaracterize the evidence or are outright false (and often are made without citation). Atlantic Richfield will not—and cannot within the word limitation—debunk all of those assertions in this Brief.

But the Court should not be misled by Plaintiffs' rhetoric or emotional appeals. Plaintiffs have no evidence (1) that any Plaintiff is sick or injured—or is at risk of becoming sick or injured—from the environmental condition of their property, (2) that any Plaintiff's property has lost value because of environmental conditions, (3) that any Plaintiff is unable to use their property as they always have, or (4) that any Plaintiff's property will benefit from their proposed remediation. Moreover, it is undisputed that Plaintiffs' properties are included in an environmental cleanup overseen by the United States Environmental Protection Agency ("EPA") and the Montana Department of Environmental Quality ("MDEQ"), which will ensure that their properties are and remain safe. Despite these concessions, Plaintiffs sought through this lawsuit to recover more than $100 million in damages.

There are no material disputed facts in this appeal. Nor does this appeal require the Court to make new law. The District Court faithfully applied undisputed facts to established law to reach its decision. This Court should affirm.

STATEMENT OF THE FACTS

Plaintiffs' Brief ignores the extensive and undisputed factual record supporting the widespread knowledge of the environmental condition of Plaintiffs' properties, which Atlantic Richfield summarizes here.

I. THE UNDISPUTED FACTUAL RECORD ESTABLISHED WIDESPREAD PUBLIC KNOWLEDGE OF THE ENVIRONMENTAL CONDITION OF PLAINTIFFS' PROPERTIES.

The town of Opportunity, where most Plaintiffs live, was a planned community intended to house smelter workers who desired to live in a rural atmosphere in close proximity to their workplace. (AR-App-0071-78, 800-01.) The Smelter is located 5 miles west of Opportunity and is clearly visible from the town. (AR-App-0086.) For nearly 100 years, the Smelter processed copper ore from mines in Butte to produce metallic copper. (AR-App-0109.) The Butte ores were naturally high in arsenic and other metals. (AR-App-0727.) During the smelting process, some of that arsenic was emitted from the Smelter stack and settled on the surrounding land.

Shortly after smelting operations began, farmers began to complain that this arsenic was harming their livestock—on the very same properties that Plaintiffs sue over today. (AR-App-0778-79.) The farmers eventually brought suit in 1905. (AR-App-0068.) The case, *Bliss v. Anaconda Copper Mining Co.*, 167 F. 342 (D. Mont. 1909), *aff'd sub nom. Bliss v. Washoe Copper Co.*, 186 F. 789 (9th Cir. 1911), included a four-year, highly publicized trial that resulted in multiple published

decisions. That case began a long period of legal conflict over damages caused by smelter smoke to property in the vicinity of the Smelter. (AR-App-0716-22.) As a result of *Bliss* and other similar lawsuits, 61 of the 77 properties at issue in this case are currently subject to easement and covenant rights that permit deposition of smoke, tailings, and other smelter waste onto the properties. (AR-App-0660-71, -727.) Plaintiffs have, at least, constructive knowledge of these easements and covenants, which were recorded and appear in their chains of title. (AR-App-0660-71.)

The cleanup of the smelter site has also been well known. In 1983, the Anaconda Smelter Superfund Site was added to the National Priorities List ("NPL") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). (AR-App-0109.) The Site encompasses over 300 square miles, including Plaintiffs' communities. (*Id.*)

The Site was divided into various units, including the Community Soils Operable Unit ("CSOU"), which addressed potential contamination in residential soils. The CSOU included an extensive soil sampling effort throughout the communities of Anaconda, Opportunity, and Crackerville starting in 2002. (AR-App-0111-12.) Pursuant to EPA's Record of Decision, sampling has been available for all Plaintiffs' properties since 2002. For any residential yard that exceeded the EPA-mandated arsenic action level—250 parts per million ("ppm")—the yard was remediated up to a depth of 18 inches below surface and replaced with clean soil and a

vegetative cover. (AR-App-0111.) Since the program began, approximately 1,740 residences have been sampled under this program, and 350 yards have been remediated, including some of Plaintiffs' yards. (AR-App-0112.)

One of the basic requirements of CERCLA is that the public be informed and have an opportunity to provide input as sites are evaluated and response actions chosen. (AR-App-0110.) To comply with these requirements, Atlantic Richfield took out full page advertisements in the Anaconda Leader every year from 2002-2005, which contained information describing potential health risks, precautions to mitigate those potential risks, and answers to frequently asked questions. (AR-App-0130, -0148.)

Atlantic Richfield and EPA also created a public document repository, containing numerous documents from EPA's administrative site file. (AR-App-0089, -0120.) They sought to involve the public in the decision-making process by soliciting public comment and holding numerous public meetings regarding cleanup decisions. (AR-App-0081-82, -0087-89.) And local media has extensively covered the environmental investigation and cleanup at the site. (AR-App-0081, -0087-89, -0150.) Articles about free testing of private wells, free residential soil sampling and remediation, and other issues related to Superfund activity appeared in local newspapers throughout the early 2000s. (AR-App-0088-89.) Since the 1970s, hundreds of articles have been published in local newspapers that discuss pollution

from the former smelting activities in Anaconda and efforts to address that pollution. (*Id.*)

Modern-era lawsuits also establish public awareness of environmental contamination in the area surrounding the Smelter. These include multiple lawsuits filed in the 1980s by the United States, the State of Montana, and dozens of private citizens—including a lead Plaintiff in this case, Michelle Christian. (AR-App-0153-62, -0168-74, -0749-50.) Those lawsuits concerned the exact same contamination as alleged in this lawsuit, and often the exact same properties.

In addition to the widespread public awareness, Plaintiffs' own admissions confirm their knowledge of smelter operations and the subsequent environmental cleanup long before they filed this action. Most Plaintiffs either worked at the Smelter while it was operating, or had a close family member who did. (AR-App-0064.) Many Plaintiffs had notice that their property was in a Superfund site in their deeds, in appraisals, or in building permits. (AR-App-0208.) Moreover, many Plaintiffs' properties were sampled for potential soil and groundwater contamination years before this lawsuit. (AR-App-0211.)

Several Plaintiffs attended public meetings hosted by EPA and Atlantic Richfield about environmental cleanup in the area and cleanup of residential yards under the CSOU, and many received correspondence from Atlantic Richfield and regulatory agencies about potential contamination on or near their properties. (AR-

App-0214.) Moreover, several Plaintiffs were members of the Opportunity Citizens Protection Association, a citizens' group that engaged in several years of community outreach concerning environmental issues, which included mass mailings, meetings, and engagement with students from the University of Montana, who interviewed residents, including many Plaintiffs. (AR-App-0228.)

In fact, many Plaintiffs testified that they knew of or were concerned about potential environmental contamination on their properties many years before this lawsuit was filed. (*See, e.g.,* Niland Deposition (agreeing that "[r]esidents of Opportunity have raised issues about their domestic well water quality since the 1990s") (AR-App-0177-78); Phillips Deposition ("We grew up in arsenic.") (AR-App-0182); Raasakka Deposition (suspected contamination since 1962 from "just knowing what's going on here for the last—since I've been here") (AR-App-0187); Ryan Discovery Responses ("Plaintiffs suspected contamination existed on their property when they learned of soil testing done by ARCO in the area in 2003.") (AR-App-0190); Salle Deposition (first suspected his property was contaminated from "hearing about it in the papers probably in the later 90s–2000 somewhere in there") (AR-App-0196); Schlosser Deposition ("You always know there's a potential problem ... out there. I mean you'd have to be a moron not to figure that out.") (AR-App-0200-01).)

II. PLAINTIFFS TRY TO CREATE FACT DISPUTES BY MISCHARACTERIZING THE RECORD.

Unable to dispute the overwhelming evidence of public and individual notice, Plaintiffs instead attempt to create the perception of disputed facts regarding the severity and danger of the alleged contamination. These assertions, however, are demonstrably untrue.

As just one example, Plaintiffs say that "[t]he State of Montana's cleanup level for arsenic in soil (based on the 'background' level of arsenic in the State and the acceptable cancer risk) is 40 ppm," and then compare that supposed standard to the 110 ppm average arsenic concentration found in Plaintiffs' soil. (Pls.' Br. at 22.) But the MDEQ paper that Plaintiffs cite actually says that background "arsenic concentrations in native Montana soils can range from 0.94 [ppm] to 187 [ppm]." (AR-App-0456.) The paper also proposes that 40 ppm arsenic be used as a default action level where site-specific background data or health-based standards are lacking, but goes on to say that the "generic action level *may not be appropriate for all facilities [as] [s]ite-specific background concentrations may exceed the generic action level.*" (*Id.* (emphasis added).) Moreover, MDEQ makes clear that—directly contrary to Plaintiffs' assertion—the 40 ppm default is *not* based on a determination of cancer risks. (*See id.*)

Plaintiffs also mischaracterize the site-specific 250-ppm arsenic standard—established by EPA and MDEQ—and falsely state that 41 of Plaintiffs' properties

exceed this standard. (Pls.' Br. at 5, 24.) Plaintiffs' count is apparently based on the number of properties where any single location at any depth exceeds 250 ppm. But EPA's action level is based on "an area-weighted average soil concentration"—the average of multiple samples from across an entire residential yard—because that is "more representative of long-term exposures" for the whole property. (AR-App-0691.) By EPA's count, only nine of Plaintiffs' properties have an area-weighted average concentration that exceeds 250 ppm and thus can truthfully be said to exceed the action level. (AR-App-0270-71.) For these nine properties, Atlantic Richfield has already agreed to conduct soil remediation pursuant to EPA protocols. (*Id.*)

Plaintiffs' effort to use these and other mischaracterizations to imply grave danger to Plaintiffs' health is belied by the undisputed facts:

- No Plaintiff has asserted any health injuries as a result of property conditions in this case. (AR-App-0432.)
- Plaintiffs' own expert toxicologist admitted he was unaware of "any evidence anywhere of any person in the Anaconda Smelter Superfund Site having an adverse health effect from exposure to arsenic in residential soil." (AR-App-0391.)
- There has been no diminution of Plaintiffs' property values as a result of environmental impacts. (AR-App-0084-96.)
- Plaintiffs testified that they continue to live on their properties and use them in all the ways they always have, including for gardening and recreation. (AR-App-0416-19.)
- Plaintiffs' properties are within an EPA-directed Superfund Site involving ongoing sampling and monitoring of conditions on and near Plaintiffs'

properties and requiring remediation where necessary to protect health and the environment. (AR-App-0109-12.)

The Court thus should not be misled by Plaintiffs' mischaracterizations of undisputed facts regarding the actual conditions on their properties and what those conditions mean for Plaintiffs' property use and health.

III. THE INSTANT LITIGATION.

Despite pervasive knowledge of the environmental conditions in their community, Plaintiffs did not commence this action until April 17, 2008. (Order at 4.) Plaintiffs asserted eight claims—nuisance, trespass, strict liability, negligence, negligent misrepresentation, constructive fraud, unjust enrichment, and wrongful occupation of property. (AR-App-0018-25.) Four years after this lawsuit was filed, both Plaintiffs and Atlantic Richfield sampled the soil and water on all of Plaintiffs' properties. The sampling showed that 9 of the 77 properties exceeded EPA soil action levels. Atlantic Richfield promptly offered to remediate those properties. No sampling revealed contamination in Plaintiffs' drinking water. (AR-App-0653-56.)

A. Plaintiffs' Proposed Abatement.

Plaintiffs complained that soil on their properties contains metals, particularly arsenic, as a result of historical smelter operations. Plaintiffs' expert John Kane proposed to remove the entirety of the top two feet of soil, regardless of actual metal concentrations, from every property—650,000 tons of it in all—and to dispose of it at a waste repository in Spokane, Washington. (AR-App-0762, -0766.) Mr. Kane then

proposed to replace Plaintiffs' yards with "clean" fill from unidentified sources and re-sod the yards. (*Id.*)

Plaintiffs also asserted that the shallow groundwater beneath their properties contains arsenic from historical smelter operations. Plaintiffs conceded, however, that this shallow groundwater contamination was "minor" (AR-App-0293) and that the deeper groundwater—which is the water Plaintiffs actually use through their domestic wells—is not contaminated. (AR-App-0760.) Plaintiffs do not use or even come in contact with the shallow groundwater on their property. (AR-App-0238-39, -0283-84.)

Nonetheless, Mr. Kane opined that abatement of Plaintiffs' alleged groundwater injury requires installation of several underground Passive Reactive Barrier ("PRB") walls on property that Mr. Kane conceded was not owned or controlled by any Plaintiff. The largest of these would be 8,000 feet long, 15 feet deep, and three feet wide. (AR-App-0763, -0766.)

Mr. Kane estimated that his proposed remedy would take 20 months to complete and cost anywhere from $38-$101 million. (*Id.*)

B. The District Court's Order.

Relying on the undisputed record of knowledge of the environmental condition of these areas, and several critical concessions by Plaintiffs, the District Court concluded that Plaintiffs failed to comply with the statutes of limitations. The court

correctly determined that Plaintiffs' claims accrued in the early 1980s, when all the facts underlying their claims had occurred. (Order at 4.) The court then carefully considered two exceptions to the statutes of limitations.

First, the court considered whether the statutes of limitations were tolled by the discovery rule. The court concluded that the discovery rule did not apply because Plaintiffs' claims were neither concealed nor self-concealing; and, in light of the "widespread awareness of the potential contamination," Plaintiffs "should have known the facts constituting their claims long before April 17, 2005." (Order at 7.)

Second, the court considered whether the limitations period was extended for Plaintiffs' nuisance and trespass claims by the continuing tort doctrine. Adhering to the recent precedent of *Burley v. BNSF Railway Co.*, 2012 MT 28, 364 Mont. 77, 273 P.3d 825, the District Court found that Plaintiffs failed to produce evidence to establish a continuing tort. The court held that *Burley* required Plaintiffs to show that the environmental contamination was continuing to migrate, and that Plaintiffs had not even argued that there was continuing migration. The court also held that Plaintiffs had failed to present evidence that their proposed remedy was reasonable or that their properties would be improved by the proposed abatement. Finally, the court noted that Plaintiffs failed to explain how they could circumvent the requirement that EPA approve their proposed abatement.

Because there were no genuine issues of material fact on any of these points, the Court entered summary judgment on Plaintiffs' claims.

STANDARD OF REVIEW

Montana Rule of Civil Procedure 56(c) requires that summary judgment be entered "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact." This Court reviews a grant of summary judgment *de novo,* applying the same criteria as the District Court. *Estate of Willson v. Addison*, 2011 MT 179, ¶11, 361 Mont. 269, 258 P.3d 410. The party opposing summary judgment "must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, that raises a genuine issue of material fact." *Id.* ¶14. And "the proffered evidence must be material and of a substantial nature, not fanciful, frivolous, gauzy or merely suspicious." *Id.*

SUMMARY OF ARGUMENT

In *Burley*, this Court addressed how statutes of limitations apply to environmental tort claims. This case presents a straightforward application of *Burley* and asks whether Plaintiffs' claims can wholly avoid the statutes of limitations where the undisputed facts show (1) pervasive and long-held knowledge by Plaintiffs and the public of the environmental conditions at issue, (2) the lack of any migration of the alleged contaminants, and (3) a failure by Plaintiffs to propose a reasonable abatement that would provide any benefit to their properties. Applying established precedent to

these undisputed facts, the District Court correctly held that Plaintiffs' claims are time-barred.

Plaintiffs have no justification to escape the applicable statutes of limitations. The overwhelming and undisputed evidence shows that their claims have been the subject of widespread community knowledge and extensive media attention, and thus were not concealed from anyone. The undisputed facts further show that these claims either were known or should have been known by Plaintiffs many years before they filed this action.

The undisputed evidence also shows that Plaintiffs' nuisance and trespass claims cannot be salvaged by the continuing tort doctrine because, for claims based on stabilized environmental contamination, the doctrine applies only where the contamination continues to migrate and is reasonably abatable. Plaintiffs have no evidence to carry their burden on either of these requirements.

Finally, even if the continuing tort doctrine did apply, Plaintiffs' claims still would be barred. Under the continuing tort doctrine, Plaintiffs would be limited to recovering damages incurred during the two-year period preceding the filing of their complaint. Because the undisputed facts establish that no damages were incurred during that period, Plaintiffs' claims fail and Atlantic Richfield is entitled to summary judgment.

ARGUMENT

I. PLAINTIFFS' CLAIMS ACCRUED NO LATER THAN 1980.

Plaintiffs filed this action on April 17, 2008, asserting eight claims based on the same set of facts—that their properties were contaminated by historical mining and smelting operations. (AR-App-0016-17.) A cause of action accrues and the statute of limitations starts to run when all the facts constituting the claim have occurred—lack of knowledge of the claim, or of its accrual, is irrelevant. *See* § 27-2-102(2), MCA; *Pederson v. Rocky Mountain Bank*, 2012 MT 48, ¶19, 364 Mont. 258, 272 P.3d 663 ("Mere ignorance of the facts will not toll the statutes of limitations."). Each of Plaintiffs' claims must be brought within either two or three years of its accrual. (Order at 4.) Because Plaintiffs concede that all of the conduct they complain of occurred between 1884 and 1980, their claims are time-barred unless they qualify for an exception to the statutes of limitations. As demonstrated below, they do not.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DISCOVERY RULE DOES NOT SAVE PLAINTIFFS' CLAIMS FROM BEING BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.

Plaintiffs contend that the statutes of limitations should be tolled based on the "discovery rule," which requires them to establish: (1) that the facts constituting their claims were concealed or self-concealing; and (2) that the facts were neither discovered nor in the exercise of due diligence should have been discovered prior to

April 17, 2005. § 27-2-102(3), MCA. Plaintiffs cannot satisfy either requirement of the rule.

A. The Alleged Contamination Is Neither Concealed Nor Self-Concealing.

Although lack of knowledge does not normally delay the running of the statute of limitation, the discovery rule provides an exception where "the facts constituting the claim are by their nature concealed or self-concealing." § 27-2-102(3). The discovery rule applies where "it is virtually impossible for the plaintiff to realize he has a cause of action." *Mont. Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339, 1347 (D. Mont. 1991), *aff'd*, 993 F.2d 676 (9th Cir. 1993). The plaintiff has the burden to establish the applicability of the discovery rule. *Chriske v. State ex rel. Dep't of Corr.*, 2010 MT 149, ¶21, 357 Mont. 28, 235 P.3d 588; 54 C.J.S. Limitations of Actions § 428 n.1 ("A plaintiff who seeks to rely on discovery principles to avoid the statute of limitations bar bears the burden of establishing the facts underlying his or her inability to discover the claim.").

Plaintiffs failed to produce evidence that their claims were either concealed or self-concealing. That metals from the Smelter were deposited on the surrounding properties—including Plaintiffs' properties—was well known since the early 1900s. On 61 of 77 properties, easements expressly permit the deposit of smelter emissions, and many Plaintiffs' deeds also state that the property is located within a Superfund site. *See, e.g., Jones v. Texaco, Inc.*, 945 F. Supp. 1037, 1043 (S.D. Tex. 1996)

(subsurface contamination was not self-concealing where information in the chain of title provided notice that the property could be contaminated). A massive environmental investigation and remediation has taken place in and around Plaintiffs' communities since the early 1980s and has been the subject of extensive community outreach and media attention. And numerous Plaintiffs admitted they suspected metals from the Smelter could be on their properties—and many actually had their properties sampled—long before 2005.

Plaintiffs do not dispute any of these facts—rather, they argue that the discovery rule should apply because, "without the benefit of highly technical, and prohibitively expensive, environmental sampling, [they] had no means of determining what, if any, material from the stack settled and remained on their property after many years," and "[i]nvisible pollution, which cannot be detected absent environmental sampling and laboratory analysis, is, without question, self-concealing." (*Id.* at 36-37.) But Plaintiffs cite no authority that supports these statements. And, as the District Court observed, this "self-serving argument ... ignores the circumstances of this case, including widespread awareness of the potential contamination of their properties and the availability of environmental testing or other opportunities to

discover relevant facts." (Order at 7.) Indeed, free environmental sampling was offered by Atlantic Richfield to all Plaintiffs starting in 2002.[1]

Nor could environmental sampling possibly have been the triggering event for discovery of Plaintiffs' claims. Many Plaintiffs had their properties sampled years before filing their claims; many others, however, filed their claims years before their properties were ever sampled. Regardless of whether their individual property had been sampled, each Plaintiff in this case *must have discovered* the facts underlying their claims sometime before filing this lawsuit. Tellingly, however, Plaintiffs can point to no fact that was previously concealed which—upon discovery—enabled them to file their claims. In light of these undisputed facts, the District Court correctly ruled that Plaintiffs' claims were neither concealed nor self-concealing.

B. Plaintiffs Knew Or Should Have Known The Facts Constituting Their Claims Before April 17, 2005.

Even if the discovery rule applied, it would only toll the statutes of limitations "until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party." § 27-2-102(3), MCA. Based on the extensive public knowledge—and many Plaintiffs' admissions that they

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[1] Plaintiffs cite *Blackburn* v. *Blue Mountain Women's Clinic*, 286 Mont. 60, 951 P.2d 1 (1997) for the proposition that "claims based on information which cannot be discovered absent specialized inquiry are, by their nature, self-concealing." (Pls.' Br. at 37.) *Blackburn*, however, does not even discuss claims requiring testing or "specialized inquiry." Moreover, unlike here where the facts underlying Plaintiffs' claims have been widely known and broadly publicized for decades, the plaintiff in *Blackburn* had no way of knowing—or reason to suspect—that she had been injured.

knew or suspected there were residual metals on their property—the District Court held that "Plaintiffs cannot reasonably argue that they were unaware of some potential environmental damage to their respective properties until April 17, 2005 or thereafter." (Order at 6.) On appeal, Plaintiffs still do not dispute the facts establishing their constructive knowledge. Instead, they assert arguments that simply ignore the controlling law.

First, Plaintiffs argue that "[w]hether a plaintiff should have known earlier of his or her claim is a question of fact for the jury." (Pls.' Br. at 38.) However, when a plaintiff fails to raise a genuine issue of material fact regarding whether he had actual or constructive knowledge of facts to put him on notice of his claims, summary judgment is appropriate. *See, e.g., Chriske*, ¶20; *Town of Clyde Park v. Younkin*, 2004 MT 274, ¶13, 323 Mont. 197, 99 P.3d 196 (both affirming summary judgment based on constructive knowledge).[2]

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[2] On similar factual records, other courts have found, as a matter of law, sufficient notice to trigger the statute of limitations. *See, e.g., In Re Burbank*, 42 F. Supp. 2d 976, 981-82 (C.D. Cal. 1998) (Where there were numerous public meetings on contamination from the manufacturer's facility, EPA sent fact sheets to interested residents, citizen groups were formed to address the contamination, the plaintiffs read news articles about the contamination and had had their water tested, the "facts and admissions by plaintiffs clearly demonstrate[d] that plaintiffs not only should have known, but actually knew, of the Burbank contamination prior to [the statutory period]."); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 722-23 (6th Cir. 2004) (similar); *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1115-17 (N.D. Ill. 1998) (similar).

Second, Plaintiffs argue that the statutes of limitations could not have run on their claims because they were not *certain* whether contamination existed *on their individual properties* until the sampling performed in this lawsuit. (*See* Pls.' Br. at 35.) But "[i]t is not enough for the plaintiff merely to say that he was ignorant of the facts ... if he has 'notice or information of circumstances ... which if followed would lead to knowledge.'" *Mobley v. Hall*, 202 Mont. 227, 232, 657 P.2d 604, 606 (1983). Plaintiffs are not allowed to await absolute certainty or positive knowledge of their claims in order for the statute to begin to run. *Id.*, 202 Mont. at 233, 657 P.2d at 607 ("[T]he law does not contemplate such discovery as would give positive knowledge."); *Mont. Pole*, 993 F.2d at 678-79 (Montana's discovery rule "does not mean that a party must know every fact relating to the claim before the statute begins to run.").

Plaintiffs protest that, although they "'suspected' ARCO's activity may have harmed their properties," they did not know conclusively until recent sampling conducted in conjunction with this litigation. (Pls.' Br. at 37-38.) This concession is fatal. Plaintiffs' admission that they "'suspected' ARCO's activity may have harmed their properties" establishes notice. *See Migliori v. Boeing N. Am., Inc.*, 97 F. Supp. 2d 1001, 1009 (C.D. Cal. 2000) ("A plaintiff discovers the claim when he or she at least *suspects* an injury that was caused by wrongdoing.... So long as a *suspicion* exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts

to find her.") (emphasis added). By Plaintiffs' own admission, there is no genuine dispute that Plaintiffs had knowledge that would lead a reasonably prudent person to inquiry or action—and that is enough under Montana law. *See Mobley*, 202 Mont. at 233, 657 P.2d at 607.

Third, Plaintiffs argue that, because Atlantic Richfield advised Plaintiffs "that their properties had no problems from arsenic contamination," and that "the community was not at risk," Plaintiffs did not have notice of their claims. (Pls.' Br. at 36, 39.) Although Plaintiffs cite to various representations made by Atlantic Richfield, they offer no evidence that any of these representations were false or misleading in any way. For example, Plaintiffs cite to letters Atlantic Richfield sent to Plaintiffs who had their properties sampled notifying them of arsenic levels on their properties and informing them that their yards did not exceed EPA's action level of 250 ppm of arsenic in soil. (Pls.' Br. at 4.) Yet Plaintiffs do not dispute that those results were correct and reported accurately. (*See* Atlantic Richfield's Reply Supp. Mot. Summ. J. on Punitive Damages (AR-App-0639-40).) With respect to other representations made by Atlantic Richfield (Pls.' Br. at 39), Plaintiffs offer no evidence that such representations were false or that any Plaintiff ever heard or relied on such statements. (Atlantic Richfield's Reply Supp. Mot. Summ. J. on Constructive Fraud (AR-App- 0643-45).)

C. There Is No Special Discovery Rule For Environmental Cases In Montana.

Citing *In re Tutu Wells Contamination Litigation*, 909 F. Supp. 980 (D.V.I. 1995), and *Taygeta Corp. v. Varian Associates*, 763 N.E.2d 1053 (Mass. 2002), Plaintiffs urge the Court to "apply the discovery doctrine broadly in this case." (Pls.' Br. at 43-44.) In light of Montana's well-defined statutory discovery rule, there is no basis for the Court to do this, nor would doing so change the result.

Section 27-2-102(2), MCA, mandates that the period of limitations begins when a claim or cause of action accrues "*unless otherwise provided by statute.*" The statute goes on to define the limited scope of the exception provided by Montana's discovery rule. § 27-2-102(3), MCA. Any other exception to the statute of limitations must be provided by statute and cannot be created by a court.

In addition, the discovery rules articulated in the cases cited by Plaintiffs are unique to those jurisdictions and have no relevance to Montana law. *See In re Tutu*, 909 F. Supp. at 986 ("[T]he court acknowledges that it adopts what may be a minority interpretation of the traditional discovery rule."); *Taygeta*, 763 N.E.2d at 1061 (applying discovery rule based on Massachusetts environmental statutory scheme). Regardless, in light of the overwhelming facts demonstrating Plaintiffs' knowledge here, their claims would be time-barred even under the rules in these cases.

III. THE DISTRICT COURT CORRECTLY RULED THAT THE CONTINUING TORT DOCTRINE DID NOT APPLY TO PLAINTIFFS' CLAIMS.

The statute of limitations for a nuisance or trespass claim is two years and ordinarily begins to run as soon as the tort is committed. Montana law, however, "recognizes an exception to this general rule." *Burley*, ¶14. "This exception, denominated as the continuing tort doctrine, applies to a temporary injury that gives rise to a new cause of action each time that it repeats." *Id.* The "consistent theme" in Montana cases "that evaluate whether a nuisance should be classified as temporary or permanent [is] whether the injury is sufficiently complete to ascertain permanent damages." *Id.* ¶41.

The continuing tort doctrine cannot save Plaintiffs' claims in this case. First, the District Court correctly held that the continuing tort doctrine applies only to nuisance and trespass claims; thus, all of Plaintiffs' other claims were properly dismissed. Second, with respect to their nuisance and trespass claims, the District Court correctly recognized that, under *Burley*, Plaintiffs must demonstrate continued migration. *Id.* ¶73. Here, Plaintiffs presented no evidence that the contamination they complain of continues to migrate. Third, when plaintiffs assert claims based on environmental contamination, the continuing tort doctrine applies only where the contamination is "reasonably abatable." *Id.* ¶89. Plaintiffs' proposed remedy could cost more than $100 million, would require the approval of government agencies that

have already rejected it, and would confer no benefit on Plaintiffs' properties. As the District Court correctly held, such a remedy cannot be considered a "reasonable abatement."

A. The Continuing Tort Doctrine Can Apply Only To Nuisance And Trespass Claims.

This Court has declined to extend the continuing tort doctrine to claims other than nuisance and trespass, finding such an extension "contrary to the general policy underlying statutes of limitation." *Gomez v. State*, 1999 MT 67, ¶25, 293 Mont. 531, 975 P.2d 1258; *accord Mont. Pole*, 775 F. Supp. at 1347-48 (refusing to apply the continuing tort doctrine under Montana law to claims other than nuisance and trespass in an environmental contamination case); *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 974 (9th Cir. 2013) ("California does not recognize a claim for continuing negligence per se or continuing strict liability."); *Church v. GE*, 138 F. Supp. 2d 169, 174 (D. Mass. 2001) ("The only continuing torts recognized in Massachusetts are nuisance and trespass."). Plaintiffs provide no reason to depart from these authorities and cite no relevant authority of their own.[3] The District Court thus did not err in limiting the continuing tort doctrine to claims for nuisance and trespass.

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[3] Plaintiffs cite *Guenther v. Finley*, 236 Mont. 422, 769 P.2d 717 (1989) and the Restatement (Second) of Torts § 165. (Pls.' Br. at 32-33.) These sources do not mention the continuing tort doctrine and have no apparent application to the issue at hand.

B. For Nuisance And Trespass Claims Based On Stabilized Environmental Contamination, The Continuing Tort Doctrine Applies Only Where The Contamination Continues To Migrate.

1. The Alleged Contamination Must Continue To Migrate.

In *Burley*, this Court held that "contamination that has stabilized in terms of quantity or concentration, ***but continues to migrate*** will toll the statute of limitations until the harm no longer reasonably can be abated." *Burley*, ¶4 (emphasis added); *see also id.* ¶¶73, 99. Despite this clear and unequivocal language, Plaintiffs argue that *Burley* "recognized the continuing nature of a nuisance is *not dependent on migration.*" (Pls.' Br. at 14 (emphasis added).)

It is beyond reasonable dispute that continued migration was an essential part of the *Burley* holding. As the District Court recognized, "[t]hroughout the *Burley* opinion, the ... Court confirms the requirement that the alleged environmental contamination be migrating if the applicable statutes of limitations are to be tolled." (Order at 8.) In *Burley*, BNSF argued that whether the defendant continues to act—not whether contamination continues to migrate—should determine whether a tort is "continuing." *Burley*, ¶¶53, 68. After reviewing the Montana case law on continuing torts, this Court rejected this argument, siding with the "more flexible standard" urged by the plaintiffs that would consider migrating contamination to constitute a continuing tort. *Id.* ¶57. The Court reasoned that to hold otherwise would bar a plaintiff from bringing a nuisance action even if migrating contamination from the

defendant's tortious actions continued to affect different parts of the plaintiff's land each day. *Id.* ¶73.

A principal rationale behind this doctrine is that a plaintiff cannot reasonably ascertain his damages when the tort is continuing. *Id.* ¶41. Continuing migration of pollution onto a plaintiff's property can make damages difficult to ascertain. *See id.* ¶73. But where the nature of environmental contamination has not changed in decades, there is no uncertainty and no justification for applying the continuing tort doctrine. Thus, the District Court did not err in holding that, "[w]ith respect to nuisance and trespass claims based on stabilized environmental contamination, the continuing tort doctrine applies only where the contamination continues to migrate and is reasonably abatable." (Order at 8 (citing *Burley*, ¶99).)[4]

2. *Plaintiffs Produced No Evidence Of Continued Migration.*

In the District Court, Plaintiffs offered no evidence of migration, and the evidence before the court showed that contamination *did not* continue to migrate to either Plaintiffs' soils or groundwater. (*See* Atlantic Richfield's Mot. Summ. J. at 21-

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[4] Plaintiffs support their selective reading of *Burley* with two older cases, *Graveley Ranch v. Scherping*, 240 Mont. 20, 782 P.2d 371 (1989), and *Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986). However, *Burley* specifically describes the contamination in *Gravely* as migrating. *Burley*, ¶34. And *Shors* did not involve claims of environmental contamination, so continued migration did not factor into the analysis one way or the other. Regardless, neither of these cases can override the express holding in *Burley*, where the Court thoroughly discussed these previous cases and articulated a rule requiring continued migration to trigger the continuing tort doctrine in the context of stabilized environmental contamination.

26 (AR-App-0051-56); Pls.' Resp. at 7-8 (AR-App-0338-39).) Plaintiffs' own expert conceded that impacts to Plaintiffs' soils stopped no later than the late 1980s or early 1990s. (AR-App-0245-46.) And Plaintiffs' experts offered no opinion on the migration of contaminated groundwater onto their properties. (AR-App-0283-87.) Instead, Plaintiffs argued that migration is not required for a continuing tort. (AR-App-0338-39.) On this record, the District Court found that Plaintiffs "have not identified any evidence that the environmental contamination on their properties continues to migrate. Rather, the Plaintiffs apparently concede that the environmental degradation on their properties has not changed in decades." (Order at 8.)

i. Plaintiffs May Not Rely On Arguments And Evidence Not Presented To The District Court.

Plaintiffs now argue—for the first time—that if they are required to prove migration to qualify for the continuing tort exception, they can present such evidence. (Pls.' Br. at 14-16.) But Plaintiffs cannot seek to overturn the District Court's decision with new arguments and evidence never presented below. *See Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶20, 373 Mont. 1, 313 P.3d 839 ("It is well established that we do not consider new arguments or legal theories for the first time on appeal ...."). The rule limiting Plaintiffs on appeal to the arguments and evidence they fairly presented to the District Court is no mere technicality; rather, it is a fundamental protection of the integrity of appellate review and of due process in the trial court. *State v. Adgerson*, 2003 MT 284, ¶12, 318 Mont. 22, 78 P.3d 850 ("A

party may not raise new arguments or change its legal theory on appeal, because it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.").[5]

This rule is especially applicable here because Plaintiffs try to support their new argument with evidence outside the record that was never presented to or considered by the District Court. In particular, Plaintiffs offer a document from EPA's Administrative Record that they did not rely on below and is not in the record on appeal. (Pls.' Br. at 14-15.) "It is axiomatic that this Court will not consider evidence not contained in the record on appeal." *State v. Spina*, 1999 MT 113, ¶17, 294 Mont. 367, 982 P.2d 421; *see also State v. MacKinnon*, 1998 MT 78, ¶15, 288 Mont. 329, 957 P.2d 23 ("We continue to condemn this practice and again remind counsel that parties on appeal are bound by the record and may not add additional matters in briefs or appendices. We will not tolerate an attempt to introduce extraneous information into the proceedings."). Regardless, as discussed below, the "extraneous information" Plaintiffs rely upon does not establish continued migration.

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[5] In oral argument at the District Court, Plaintiffs' counsel briefly stated that "[w]e do actually have evidence of migration with respect to the groundwater," although conceding "[w]e haven't argued that in the brief" and then failing to provide any such evidence. (AR-App-0821-22.) This passing comment is not sufficient to allow Plaintiffs to assert the argument here. *See McCulley v. Am. Land Title Co.*, 2013 MT 89, ¶23, 369 Mont. 433, 300 P.3d 679 (refusing to address appellant's new argument even though it "mentioned [the issue] in passing" below).

ii. There Is No Evidence Of Continued Migration.

Plaintiffs' sole support for their new argument that "the pollution at issue is migrating," (Pls.' Br. at 14), is Plaintiffs' own proposed groundwater remedy and the statement of an EPA consultant outside of the record. Neither reference, however, establishes that contamination continues to migrate onto Plaintiffs' properties.

First, while Plaintiffs' proposed groundwater remedy suggests that PRB walls would prevent migration of contaminants onto their properties, Plaintiffs have presented no evidence, and their experts have offered no opinion, that such migration is actually occurring or has occurred in the last 30 years.

Second, the EPA document Plaintiffs cite appears to discuss the potential leaching of arsenic from soil to groundwater, but it is unclear whether this has actually occurred, currently occurs, or what areas—if any—are affected. In fact, after exhaustive study of the area, EPA concluded that groundwater in Opportunity "has been found to be uncontaminated by arsenic." (AR-App-0311.) This conclusion is confirmed by Atlantic Richfield's expert hydrogeologist. *See* Rebuttal Report of Steven Larson ("[T]he lack of mobility of arsenic in the alluvial aquifer environment prevents the arsenic from moving into the town of Opportunity.") (AR-App-0326). Plaintiffs have no evidence to rebut these conclusions. Unlike in *Burley*, where MDEQ concluded, and the defendant did not dispute, that the contamination continued to migrate into groundwater, *see Burley*, ¶52, EPA has reached the opposite

conclusion here—there is no migration of arsenic into Plaintiffs' groundwater. Thus, Plaintiffs cannot establish a continuing tort.

C. Plaintiffs Failed To Create A Genuine Issue Of Material Fact That The Alleged Contamination Was Reasonably Abatable.

The second prong of the *Burley* test for continuing torts is that the contamination must be reasonably abatable. *See Burley*, ¶89. Because the District Court correctly found that "the Plaintiffs have not identified facts showing that their proposed abatement is reasonable," (Order at 8-9), Plaintiffs' failure on this prong is yet another reason to affirm.

1. Reasonable Abatability May Be Determined On Summary Judgment.

As an initial matter, Plaintiffs contend that *Burley* requires that the jury, not the court, decide the question of whether alleged environmental impacts are reasonably abatable. But *Burley* holds the opposite:

> A plaintiff would have to establish sufficient evidence of the potential reasonableness of the proposed abatement to send the statute of limitations question to the jury. *The District Court retains the ability to grant summary judgment where the plaintiff fails to establish a genuine issue of fact.*

Burley, ¶95 (emphasis added). Here, where the District Court concluded that "the Plaintiffs have failed to meet their burden of demonstrating conflicting material facts that should be presented to a jury," (Order at 9), summary judgment was appropriate.

2. *The Alleged Contamination Is Not Reasonably Abatable.*

In determining whether alleged contamination is "reasonably abatable," courts must evaluate whether abatement of the harm would be reasonable, taking into account all factors, including: (1) the ease with which the harm could be abated; (2) the cost of the abatement; (3) the type of property affected; (4) the severity of the contamination; and (5) the length of time necessary to remediate such pollution. *Burley*, ¶89.

Plaintiffs failed below to address these factors to show reasonableness, arguing only that their proposed abatement is technically possible. (*See, e.g.*, Pls.' Resp. at 3 ("[T]he cleanup is feasible and can be performed using accepted methods.") (AR-App-0334); Pls.' Restoration Damages Br. at 7 ("If restoration is achievable, the pollution is not permanent.") (AR-App-0587).) But the fact that a property "can be cleaned up" is not sufficient. *Burley*, ¶89 (adopting Restatement). Thus, although it is *possible* to excavate and replace 650,000 tons of soil and construct an 8,000 foot long PRB wall, what matters is whether doing so is *reasonable* considering, for example, the enormous cost compared to the lack of any actual benefit to the properties, and the many other factors that Plaintiffs simply ignored.

Once again attempting to cure defects in their argument below, Plaintiffs now maintain that application of the *Burley* factors supports their claim of reasonable abatability, asserting several arguments they did not present to the District Court. As

described above, arguments that were not raised below are now waived. *Adgerson*, ¶12. But even this belated effort fails to establish an issue of material fact, as Plaintiffs' argument is premised on misapplication of legal authority, bald assertions lacking factual support, and inappropriate reference to Atlantic Richfield's purported wealth.

For example, Plaintiffs offer no evidence that the estimated cost of the abatement ($38–$101 million) is reasonable. Instead, Plaintiffs simply make an irrelevant comparison to the facts of a different case, arguing that the cost proposed here is somehow consistent with the restoration award affirmed by the Court in *Sunburst School District No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079. (Pls.' Br. at 20-21.) As the District Court correctly observed, however, "[w]hile *Sunburst* involved issues related to environmental contamination and restoration damages, the decision did not address the standard for determining a continuing tort." (Order at 9.)

Plaintiffs' only other argument on cost is their repeated and inappropriate references to Atlantic Richfield's "substantial wealth." (*See* Pls.' Br. at 1, 6, 21.) Plaintiffs cite no authority indicating that the financial wherewithal of a defendant is relevant to the issue of reasonable abatability. Nor could they, as Montana law expressly states that evidence of a defendant's finances "is not admissible" on questions of liability and should be considered only to determine the amount of

punitive damages once a plaintiff establishes that such damages are appropriate. § 27-1-221(7)(a), MCA.[6]

Plaintiffs' effort to address the other *Burley* factors is likewise unavailing. Regarding the type of property at issue, Plaintiffs simply misstate the undisputed facts, asserting that "the contaminated property is *almost exclusively residential* property where the Opportunity Citizens have built their homes, raised their children, and resided for many years." (Pls.' Br. at 21 (emphasis added).) In reality, of the 77 properties at issue, ten are rental properties, seven are vacant lots, three are solely or primarily used for commercial purposes, and another eight are non-residential pasture land. (AR-App-0558-59, -0564-79.) Mainly due to the large size of these pastures, non-residential and rental properties make up approximately 78% of the land covered by Plaintiffs' proposed remedy (and thus account for the majority of the restoration costs Plaintiffs seek). (AR-App-0091-96, -0558-59, -0564-79.) Moreover, the properties that actually are residential are already protected by the most stringent regulatory standards within the Superfund site and are subject to the strictest EPA cleanup thresholds.

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[6] Evidence of the wealth or financial condition of a litigant is universally regarded as irrelevant, prejudicial, and inadmissible for liability purposes. *See, e.g., Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) ("[T]he ability of a defendant to pay the necessary damages injects into the damage determination a foreign, diverting, and distracting issue which may effectuate a prejudicial result."). Plaintiffs' unsubtle attempt to sway the Court with this type of argument is improper.

Regarding the severity of the contamination, Plaintiffs likewise mischaracterize the factual record to falsely portray the alleged soil contamination as "severe."[7] As explained above, Plaintiffs grossly misstate the facts regarding Montana's 40-ppm default action level for arsenic, as well as application of the 250-ppm site-specific action level established by EPA and MDEQ for the Anaconda Smelter Superfund Site. Plaintiffs also misrepresent the testimony of their expert, Richard Pleus, claiming he opines that "ARCO's pollution poses an 'unacceptable' risk of cancer." (Pls.' Br. at 23.) But Dr. Pleus admitted that he cannot offer such an opinion:

- When asked whether "plaintiffs in this case are exposed to any actual health risks based on the arsenic concentrations that are present in their residential soil on their properties," Dr. Pleus responded, "I can't determine that." (AR-App-0386-87.)
- When asked the same question again, Dr. Pleus testified, "I wasn't asked to determine health risks." (AR-App-0387.)
- When further asked whether he was "aware of any evidence anywhere of any person in the Anaconda Smelter Superfund Site having an adverse health effect from exposure to arsenic in residential soil," Dr. Pleus responded, "I haven't looked at those data ...." (AR-App-0391.)
- Finally, when asked whether he had "an opinion about whether the 250 [ppm] arsenic action level at the Anaconda Smelter Site is protective of human health for residents of Opportunity," Dr. Pleus conceded, "I wasn't asked that question." (AR-App-0386.)

Far from establishing that the alleged contamination "poses an 'unacceptable' risk of cancer," Dr. Pleus's testimony reveals that he never even considered the question.

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[7] Plaintiffs present no argument whatsoever regarding the severity of their alleged groundwater injury.

Concerning the length of time necessary to remediate the property, Plaintiffs baldly assert that "a jury could conclude that 20 months is a reasonable time-frame to abate ARCO's pollution." (Pls.' Br. at 26.) Plaintiffs make no attempt to explain the evidentiary reasons why a jury could reach this conclusion, and likewise fail to account for the harm and annoyance this massive, two-year construction project would cause to all properties in the area (most of which are owned by non-Plaintiffs) from increased truck traffic, noise, and pollution. (AR-App-0269.)

Finally, Plaintiffs fail to offer any evidence regarding the benefit that would be conferred on their properties by their proposed abatement. As the District Court explained:

> The expert opinions cited by the Plaintiffs do not include any conclusions that their properties would be improved by their proposed abatement. Likewise, while the Plaintiffs' experts criticize the particulate levels selected by the EPA as requiring remedial action, such experts' discovery responses fail to identify any harm to any Plaintiff resulting from application of those particulate levels. Similarly, the Plaintiffs' experts do not identify any particular benefit of the particulate levels they would propose.

(Order at 9.) In sum, Plaintiffs' proposed abatement—which would cost many times the value of their properties, take nearly two years to complete, and require the intrusive actions of digging up, trucking out, trucking in, and replacing 650,000 tons of soil, as well as constructing massive underground walls on properties Plaintiffs do not own—is not reasonable under the factors laid out in *Burley*, particularly in light of

Plaintiffs' failure to demonstrate any resulting benefit to their properties. Accordingly, the District Court correctly held that Plaintiffs failed to show their abatement could be deemed reasonable as a matter of law.

3. An Abatement That Cannot Be Performed Is Necessarily Unreasonable.

Finally, because Plaintiffs' properties are within a federal Superfund site, their proposed remediation cannot occur without EPA approval. 42 U.S.C. § 9622(e)(6).[8] In the course of its regulation of the site, EPA considered and rejected soil and groundwater remedies nearly identical to those Plaintiffs propose. (AR-App-0121-23.) Moreover, EPA specifically informed the District Court in this case that it does not approve the remedy Plaintiffs propose and will not allow Plaintiffs or Atlantic Richfield to undertake that remedy. (*See* EPA Amicus Brief at 21 ("EPA has not authorized the remedial action that appears to be sought by Plaintiffs in their restoration damages claims and therefore Atlantic Richfield may not undertake it .... and to the extent [Plaintiffs] seek to conduct remedial work themselves or through hired contractors, they are barred from doing so ....") (AR-App-0543).)

Plaintiffs ignore these critical facts, arguing instead that "[r]egulatory approval is not one of the factors set forth in *Burley* for evaluating the continuing nature of a

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[8] *See generally* U.S. Amicus Mot. at 2 ("CERCLA ... provides that no remedy may be undertaken at a site listed on the National Priorities List unless authorized by EPA.") (AR-App-0519); Atlantic Richfield's CERCLA Br. at 15-17 (AR-App-0492-94).

nuisance or trespass." (Pls.' Br. at 26.) Plaintiffs then devote a sizable portion of their brief to arguing that CERCLA does not preempt their common law claims, concluding that "the District Court committed reversible error by determining that the [Plaintiffs'] claims were somehow barred because EPA did not provide advance approval for the [Plaintiffs'] damage claims." (*Id.* at 30.) Plaintiffs miss the point.

The issue here is not preemption.[9] *Burley* requires abatement to be reasonable, and an abatement that is legally or physically impossible is necessarily *unreasonable*. *See* 58 Am. Jur. 2d *Nuisances* § 21 ("[A] nuisance is permanent if abatement is impracticable or impossible."); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1086 (N.J. 1996) ("[A] nuisance is continuing when it is the result of a condition that can be physically removed or *legally abated*.") (emphasis added). Far from committing reversible error, the District Court merely applied the axiom that "all plans that are impossible are necessarily unreasonable." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 205 (D.C. Cir. 1991).

Preemption is only implicated here to the extent Plaintiffs argue that the *Sunburst* decision somehow trumps the clear application of federal law. (Pls.' Br. at 30-31.) Of course, *Sunburst* held no such thing, as it interpreted Montana's

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[9] Plaintiffs are wrong that CERCLA, the federal statute from which EPA derives its authority at Superfund sites, never preempts state-law claims for property damage. For example, the Supreme Court recently recognized that CERCLA "by its terms pre-empts statutes of limitations applicable to state-law tort actions in certain circumstances." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014).

CECRA statute, not the federal CERCLA statute. Even if Plaintiffs were correct that federal law "cannot be reconciled with *Sunburst*," (Pls.' Br. at 31), however, federal law would prevail. *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1203 (9th Cir. 2002) ("The Supremacy Clause of the Constitution provides that any state law conflicting with federal law is preempted by the federal law and is without effect."); *Vitullo v. Int'l Bhd. of Elec. Workers, Local 206*, 2003 MT 219, ¶31, 317 Mont. 142, 75 P.3d 1250 (similar).

Thus, the District Court did not err in finding that EPA's rejection of Plaintiffs' remedy was further evidence that their proposed abatement is unreasonable.

IV. EVEN IF THE CONTINUING TORT DOCTRINE APPLIES, THE JUDGMENT STILL SHOULD BE AFFIRMED BECAUSE PLAINTIFFS INCURRED NO DAMAGES DURING THE LIMITATIONS PERIOD.

Settled law limits damages for a continuing tort to those incurred during the limitations period that immediately precedes the filing of the complaint (the "look-back period"). Because Plaintiffs incurred no damages during that period, the Court may affirm on this alternate ground even if Plaintiffs' nuisance and trespass claims are continuing torts.[10]

For continuing torts, recovery is limited to damages incurred in the two-year statutory period prior to filing. *Walton v. Bozeman*, 179 Mont. 351, 356, 588 P.2d

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[10] *See Johnson Farms, Inc. v. Halland*, 2012 MT 215, ¶11, 366 Mont. 299, 291 P.3d 1096 ("If we reach the same conclusion as the district court, but on different grounds, we may affirm the district court's judgment.").

518, 521 (1978) ("[W]here the nuisance is temporary and continuous in character, and gives rise to separate causes of action, a recovery may be had for damages accruing within the statutory period next preceding the commencement of the action...."); *Shors*, 221 Mont. at 397, 720 P.2d at 243 ("In a continuing tort, recovery may be had for damages accruing within the statutory period preceding commencement of the action.").

An unbroken line of Montana cases—including environmental cases—confirms this look-back rule. In *Lahman v. Rocky Mountain Phosphate Co.*, involving alleged continuous property damage from a manufacturing plant's smoke, this Court affirmed as "correct" the trial court's jury instruction that "all evidence pertaining to injuries to property occurring" more than two years prior to the complaint's filing must be disregarded. 161 Mont. 28, 32, 504 P.2d 271, 273 (1972). In *Nelson v. C&C Plywood Corp.*, involving a continuing nuisance based on groundwater pollution, this Court reversed the trial court for failing to limit damages to those incurred in the two-year look-back period. 154 Mont. 414, 433-36, 465 P.2d 314, 324-25 (1970).

Here, Plaintiffs filed their complaint on April 17, 2008. If their nuisance and trespass claims are continuing torts, Plaintiffs may only recover damages incurred between April 17, 2006 and April 17, 2008. But Plaintiffs presented no evidence of such damages. As discussed above, Plaintiffs' own expert conceded that smelter depositions onto Plaintiffs' soil ceased when the Smelter shut down, or at the latest, a

few years later when the Smelter Hill cleanup was complete. (AR-App-0245-46.) And, there is no evidence that groundwater beneath Plaintiffs' properties has been impacted at all during the look-back period.

Thus, because Plaintiffs failed to present evidence that they incurred damages within the two-year look-back period, they have no damages to recover even as continuing torts, and summary judgment is therefore appropriate.

Faced with this argument below, Plaintiffs did not even contend they had sustained damages during the look-back period, arguing instead that restoration claims should be exempted because they are "a single expense which cannot be restricted to a time-frame." (AR-App-0347.) Adopting Plaintiffs' proposed rule, however, would completely nullify the statute of limitations for continuing tort restoration damages claims. This is contrary to Montana law, which has—repeatedly and without exception—limited damages for continuing torts to the "timeframe" of the look-back period.

Persuasive authority from other jurisdictions similarly rejects Plaintiffs' argument. In *Bradley v. ASARCO* (cited with approval in *Burley*, ¶63), the plaintiffs, like those here, asserted trespass and nuisance claims based on aerial arsenic deposition from a copper smelter. 709 P.2d 782, 784-85 (Wash. 1985). The Washington Supreme Court held that, "if the trespass continues, suit for damages may

be brought for any damages not recovered previously and occurring within the [statutory] period preceding suit." *Id.* at 792.

A federal appeals court likewise applied the look-back rule in a continuing tort case where the property owner sought restoration damages to remediate migrating contamination. *BNSF Ry. Co. v. Grant*, 505 F.3d 1013, 1029 (10th Cir. 2007). The Tenth Circuit rejected the plaintiff's argument that it was "entitled to the costs of removing all [contamination] on its land." *Id.* Instead, the court held:

> BNSF can only recover removal costs for the approximately four months of [contaminant] migration between March and July of 2001, because that is the only time period falling within the two-year statute of limitations. To permit BNSF to recover for the removal of all of the [contamination] on its property would, in effect, negate the statute of limitations, as BNSF would then be able to recover for decades of [contaminant] migration.

Id. In contrast to the overwhelming authority in Montana and other jurisdictions, Plaintiffs have no authority for their proposed rule, which would completely "negate the statute of limitations" for restoration damages claims.[11]

Plaintiffs sustained no damages during the look-back period. If the Court does not conclude that Plaintiffs' nuisance and trespass claims are wholly barred by the statutes of limitations, the District Court's judgment should be affirmed for Plaintiffs'

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[11] Plaintiffs will undoubtedly rely—as they did below—on this Court's decisions in *Sunburst* and *Burley*. But neither *Sunburst* nor *Burley* reached the look-back issue. If anything, *Burley* supports Atlantic Richfield's position because the Court cited with approval *Nelson*, *Lahman*, and *Bradley*, all of which applied the look-back rule to factually similar claims. *See Burley*, ¶¶29-30, 44, 63.

failure to establish damages within the limitations period. *See Stipe v. First Interstate Bank-Polson*, 2008 MT 239, ¶14, 344 Mont. 435, 188 P.3d 1063 ("[A] claim fails as a matter of law if the plaintiff fails to establish the material elements of the claim, including damages.").

CONCLUSION

For the foregoing reasons, Atlantic Richfield respectfully requests that this Court affirm the judgment of the District Court.

Dated this 22nd day of August, 2014.

Respectfully submitted,

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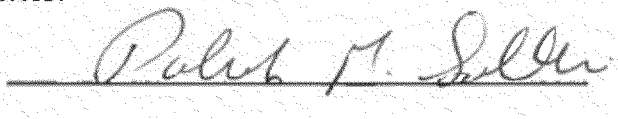
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and contains 9,791 words, excluding the table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.



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I hereby certify that on August 22, 2014, I served true and accurate copies of the foregoing APPELLEE'S ANSWER BRIEF by depositing said copies into the U.S. mail, first-class postage prepaid, addressed to the following:

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